

## **Report of Boyd-Graves Conference Compulsory Counterclaim Committee**

Members of the Committee to Study a Proposal to Adopt a Compulsory Counterclaim Rule are Stuart Raphael, Ham Bryson, Bob Mitchell, David Anthony, Jack Costello, Kent Sinclair, Lisa O'Donnell, Bill Mims, and Robin Wood, Chairman.

The Committee has met thrice by conference call: on March 25, 2008, April 30, 2008, and May 22, 2008.

In the initial conference the Chairman polled members of the Committee to determine if there was a consensus among members of the Committee in favor of a compulsory counterclaim. Seven members of the Committee said they were in favor of a compulsory counterclaim, and two members of the Committee expressed reservations about a compulsory counterclaim rule. In response to an inquiry about a compulsory counterclaim rule in other states, Kent thought that over 40 states had adopted a compulsory counterclaim rule.

The Chairman asked members to state their reasons for their position. Those members who were in favor of the rule felt that it was good public policy for all claims arising out of the same transaction or occurrence to be joined in one action. A compulsory counterclaim rule promotes judicial economy and efficiency. Under Rule 1:6, the plaintiff is required to join all claims that arise out of an identified conduct, transaction or occurrence, or later be barred from bringing a second or subsequent action against the same opposing party (parties) arising out the same conduct, transaction or occurrence. The adoption of a compulsory counterclaim rule would require the opposing party to state a claim arising out of the conduct identified in the complaint, crossclaim, or third party claim.

The members who are opposed, or skeptical, of a compulsory counterclaim rule stated that a compulsory counterclaim would increase litigation rather than reduce claims. Their rationale was that a compulsory counterclaim rule would force opposing parties to file a compulsory counterclaim who may be on the bubble about filing a counterclaim. An example, a client may be very happy or relieved, not to have to file a compulsory counterclaim when the client is not sure the facts and/or documents support a counterclaim. Those speaking against a compulsory counterclaim pointed out that the doctrine of issue preclusion (collateral estoppel) was going to continue to operate even if Virginia maintains the current permissive counterclaim regime. An opposing party takes the risk that, if it doesn't file a counterclaim that arises out of the transaction or occurrence in the complaint, the defendant may be precluded from litigating the same issue that was decided in the first action. A dissenting report is filed with this report.

The Committee discussed the exceptions to the compulsory counterclaim rule. Several members suggested that a compulsory counterclaim rule ought to allow the parties to agree in writing that a compulsory counterclaim not be stated by the opposing party, and that the writing be filed with the court. The members of the Committee also felt that an exception needed to be made for claims alleging damages to person or property arising out of the operation of a motor vehicle.

There was concern about the ability of a defendant to remove a case to the federal court after a compulsory counterclaim has been filed. The Committee reviewed proposed language to address this concern in the proposed amendments to Rule 3:9, but was unable to agree on the specific language. The proposed amendments to Rule 3:9 do not include language that would address this concern.

Ham Bryson informed the Committee that the Supreme Court had adopted a rule that allowed a defendant to file a counterclaim any time up to 21 days, or within a shorter or longer time as provided by the trial court, after the trial court has ruled on a demurrer, motion, plea to dismiss, or motion for bill of particulars. Such a provision has been incorporated to Rule 3:9.

If a compulsory counterclaim rule is adopted, there would need to be changes to Rule 3:13.

Attached to this report are proposed amendments to Rule 3:9 and Rule 3:13.

## MEMORANDUM

TO: Boyd-Graves Committee Studying Adoption of Compulsory Counterclaim Rule

FROM: Stuart A. Raphael

DATE: June 3, 2008

RE: Dissenting opinion.

I respectfully dissent from the Committee's recommendation that Virginia adopt a compulsory counterclaim rule. While I do not expect the rule to result in any parade of horrors, it will lead to a net increase in litigation involving meritless claims, imposing unnecessary costs on the parties and the judiciary.

The rule is certain to increase the number of meritless counterclaims. Under the current system, a defendant who identifies a potential but weak counterclaim relating to the same transaction or occurrence at issue in the plaintiff's lawsuit is not required to assert it. He can wait and see if discovery reveals the claim to be stronger than first thought. The possibility of filing the claim in a later action relieves the pressure of making the decision. A compulsory counterclaim rule, by contrast, ratchets up that pressure. It raises the stakes. Marginally speaking, it will cause defendants who are "on the bubble" about whether to file the claim to err on the side of doing so for fear that the claim otherwise will be lost. I think the rule thus guarantees more litigation in the short run -- litigation of marginal claims -- imposing additional costs on both the parties and the court system.

This guaranteed increase in litigation in many "first lawsuits" might be justified if it were more than offset by a reduction in "second lawsuits." But that hypothetical benefit seems ephemeral. No one on the Committee reported any personal experience with vexatious defendants filing second lawsuits based on claims arising out of the same transaction or occurrence asserted in first lawsuits. We are aware of no empirical data suggesting that such a problem exists. With respect to complex commercial and business litigation, the reality is that most cases settle. When that happens, the settlement customarily extinguishes any inchoate counterclaims that could be brought later. In the minority of instances when cases are litigated to final judgment, it appears rare indeed that a defendant seeks to launch new litigation by raising a claim relating to the same transaction or occurrence litigated in the first action.

The cost-balance therefore does not seem close. The litigation costs associated with (1) the increase in meritless "compulsory" counterclaims will greatly exceed (2) the cost-savings derived by foreclosing such claims in later cases.

My perception of this imbalance is tilted further against the need for a compulsory counterclaim rule by the operation of principles of issue and claim preclusion, and by the influence of new Rule 1:6 on any counterclaims a defendant may choose to bring.

A defendant who forgoes filing a counterclaim arising out of the same transaction or occurrence as the plaintiff's claim runs at least some risk of having his claim foreclosed by the doctrines of claim and/or issue preclusion. Although I found no Virginia case on point, the Restatement provides a "common-law compulsory counterclaim rule." Even in the absence of a statute or rule of court providing for compulsory counterclaims, the Restatement's preclusion principles will bar the later claim if "[t]he relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action." Restatement (Second) of Judgments § 22 (1982); *see also id.* Cmt. f; Kevin Clermont, Common-law Compulsory Counterclaim Rule: Creating Effective and Elegant Res Judicata Doctrine, 79 Notre Dame Law Rev 1745 (2004). Although the Supreme Court of Virginia has not yet considered it, the availability of a "common-law compulsory counterclaim rule" provides at least some comfort that a defendant cannot abuse a permissive counterclaim regime in order to undermine or circumvent a prior judgment.

Moreover, defendants currently take the risk of preclusion into account in foregoing a counterclaim. This further reinforces my suspicion that such foregone counterclaims tend to be of questionable merit, making them less likely to be brought in later litigation, notwithstanding a permissive counterclaim rule.

Rule 1:6 also operates to relieve at least some of the risk associated with vexatious second lawsuits. The rule now requires that, if a defendant files *any* counterclaim, he will have to join all other claims that arise out of the same transaction or occurrence. This further tends to reduce the risk that a serious counterclaim will be held back in the first case by a defendant eager to vex the plaintiff in later litigation.

The remaining grounds offered by some observers to support a compulsory counterclaim rule (but not advocated by members of this committee) also seem unpersuasive. It is true that other Virginia statutes and rules rely on the "same transaction or occurrence" test. That fact alone does not establish that a compulsory counterclaim rule is a good idea.

It is also true that the majority of jurisdictions and the federal courts have moved to a compulsory counterclaim rule. But again, that point alone is unpersuasive in the absence of evidence that the rule has had a beneficial impact on litigation. The Committee knows of no empirical evidence to support that conclusion. Common sense suggests that a compulsory counterclaim rule will lead to more litigation of weak claims, not less.

### **Rule 3:9. Counterclaims.**

**(a) Scope.** A defendant may plead as a counterclaim any cause of action that the defendant has against the plaintiff or all plaintiffs jointly, whether or not it grows out of any transaction mentioned in the complaint, whether or not it is for liquidated damages, whether it is in tort or contract, and whether or not the amount demanded in the counterclaim is greater than the amount demanded in the complaint.

**(b) Permissive Counterclaims.** A pleading may state any counterclaim within the range of subject matters set forth in subsection (a) above, subject to the power of the court to order separate trials as provided in subsection (j) of this rule.

#### **(c) Compulsory Counterclaims.**

**(1) In General.** a pleading must state as a counterclaim any claim that--at the time of its service--the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

**(2) Exceptions.** The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule; or

(C) the claim is not within the subject matter jurisdiction of the court where the action is pending; or

(D) the parties or their counsel have expressly agreed in writing that a compulsory counterclaim need not be stated by the opposing party and have filed the writing with the court; or

(E) the claim alleges damages to person or property arising out of the operation of a motor vehicle.

**(d) Counterclaim Against the United States or the Commonwealth of Virginia.** These rules do not expand the right to assert a counterclaim--or to claim a credit--against the United States or a United States officer or agency, or against the Commonwealth of Virginia or an officer or agency thereof, a locality or political subdivision, or officer or agency thereof.

**(e) Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

**(g) Joining Additional Parties.** Rules 3:12 and 3:16 govern the addition of a person as a party to a counterclaim.

**(h) Time for initiation.** A counterclaim shall, subject to the provisions of Rule 1:9, be filed within 21 days after service of the summons and complaint upon the defendant asserting the counterclaim, or if service of the summons has been timely waived on request under Code § 8.01-286.1, within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside the Commonwealth.; provided, however, if a demurrer, plea, motion to dismiss, or motion for a bill of particulars is filed with the court, the defendant may file any counterclaim at any time up to 21 days after the entry of the court's order ruling upon all motions, demurrers and other pleas, or within such shorter or longer time as the court may prescribe. [

**(i) Response to counterclaim.** The plaintiff shall file pleadings in response to such counterclaim within 21 days after it is served.

**(j) Separate trials.** The court in its discretion may order a separate trial of any cause of action asserted in a counterclaim.

**Rule 3:13. Third-Party Practice.**

**(a) When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may file and serve a third-party complaint upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave therefore if the third-party complaint is filed not later than 21 days after the third-party plaintiff serves an original pleading in response. Otherwise the third-party plaintiff must obtain leave therefore on motion after notice to all parties to the action. The person served with the third-party complaint, hereinafter called the third-party defendant, shall make defenses to the third-party plaintiff's claim as provided in Rules 3:7 and 3:8. Subject to the provisions of Rules 3:9 and 3:10, the third-party **defendant shall plead counterclaims against the third-party plaintiff** and cross-claims against other third-party defendants. The third-party defendant may assert against the plaintiff any defenses that the third-party plaintiff has to the plaintiff's claim. Subject to the provisions of Rule 3:9, the third-party **defendant shall also assert any claim against the plaintiff** arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may, at plaintiff's option, within 21 days after service of the third-party complaint upon the third-party defendant, assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert defenses as provided in Rules 3:7 and 3:8 and any counterclaims and cross-claims, including **claims against the plaintiff, as provided in Rules 3:9 and 3:10.** Any party may move to strike the third-party complaint, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

**(b) When Plaintiff May Bring in Third Party.** When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances that under this rule would entitle a defendant to do so.

Editor's Note: Proposed amendments to Virginia Supreme Court Rules 3:9 and 3:13 as presented